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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1980

ROCHESTER GAS AND ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

On Appeal From The Court Of Appeals Of The State Of New York

JURISDICTIONAL STATEMENT

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January, 1981

QUESTIONS PRESENTED

This appeal presents the following questions:

(1) Whether a regulatory agency's refusal to provide for the expense of communicating with customers in the setting of a public utility's rates constitutes a limitation upon the utility's right of free speech, regardless of whether such limitation is permissible or impermissible;

(2) Whether a regulatory agency, to sustain its limitation upon a public utility's right of free speech, bears the burden of proving, by a clear and compelling showing, that its limitation is necessary and no greater than necessary; and

(3) Whether due process requires that, in setting the rates of a public utility, the determination of a regulatory agency on a contested issue be supported by substantial evidence in the record of the proceeding in which the determination is made.

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JURISDICTIONAL STATEMENT

Rochester Gas and Electric Corporation appeals from the final judgment of the Court of Appeals of the State of New York, entered October 14, 1980, which affirmed the judgment of the Appellate Division of the New York Supreme Court, Third Department, and which upheld the federal constitutionality of the New York Public Service Law as construed and applied by the Public Service Commission of the State of New York in its orders of November 1, 1976 and January 20, 1978. In those orders setting appellant's rates for electric and gas service, the commission disallowed the major portion of appellant's expenses incurred for its communications with customers, without applying the standards required by the First Amendment for limitations of the right of free speech and without a record evidentiary basis as required by due process of law under the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is reported at 51 N.Y.2d 823, and is appended hereto as Appendix A. The opinion of Appellate Division of the Supreme Court of the State of New York, Third Department, is reported at 64 A.D.2d 345, 410 N.Y.S.2d 142, and is appended hereto as Appendix E. The Order Granting In Part And Denying In Part Petition For Rehearing of the Public Service Commission of the State of New York is reported at 18 NY PSC 222, and is appended hereto as Appendix G. The Opinion and Order Determining Revenue Requirement of the Public Service Commission of the State of New York is reported at 17 NY PSC 820, and is appended hereto as Appendix H.

JURISDICTION

Rochester Gas and Electric Corporation ("Rochester"), a regulated public utility, filed with the Public Service Commission of the State of New York ("commission") proposed changes in its electric and gas rates, pursuant to section 66(12) of the New York Public Service Law. Following public evidentiary hearings, briefing, a recommended decision by an administrative law judge, and briefs on exceptions, the commission, acting pursuant to the same statutory section, issued its order setting revised rates for Rochester. In setting those rates the commission disallowed the major portion of Rochester's actual, test period expenses incurred for the purpose of communicating with its customers. By Order issued in response to Rochester's application for rehearing, the commission rejected Rochester's claims that its disallowance was contrary to both Rochester's right of free speech and its right to due process of law.

Rochester commenced this action for review of the commission's action under Article 78 of the New York Civil Practice Law and Rules in New York Supreme Court, Albany County. Following transfer of the action to the Appellate Division of the New York Supreme Court, Third Department, the determination of the commission was sustained, the court rejecting

arguments that the commission's action violates Rochester's rights of both free speech and due process. Following appeal to the New York Court of Appeals, that court also sustained the commission's determination, rejecting the same constitutional claims.

The judgment of the New York Court of Appeals, from which this appeal is taken, was entered on October 14, 1980. Rochester's notice of appeal to this Court was filed with the New York Court of Appeals on December 15, 1980 and with the New York Supreme Court, Albany County, on December 16, 1980.

Jurisdiction of this appeal to review the judgment of the New York Court of Appeals is conferred upon this Court by 28 U.S.C. §1257(2). The following cases sustain this Court's jurisdiction: *Williams v. Bruffy*, 96 U.S. 176, 183 (1878); *Lake Erie & Western R.R. v. State Public Utilities Comm'n ex rel. Cameron*, 249 U.S. 422, 424 (1919); *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 437 (1919).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDERS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . .

Fourteenth Amendment, United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Section 66(12), New York Public Service Law (McKinney Supp. 1980):

> The commission shall:
>
> Have power to require every gas corporation, electric corporation and municipality hereinafter in this subdivision called a utility to file with the commission and to print and keep open to public inspection schedules

showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such utility; but this subdivision shall not apply to state, municipal or federal contracts, except to the extent such contracts relate to transportation of electricity. No change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed by a utility in compliance with an order of the commission, except after thirty days' notice to the commission and to each county, city, town and village served by such utility which had filed with such utility, within the prior twelve months, a request for such notice and which shall be affected by such change and publication of a notice to the public of such proposed change once in each week for four successive weeks in a newspaper having general circulation in each county containing territory affected by the proposed change, which notice shall plainly state the changes proposed and when the change will go into effect. The commission for good cause shown may, except in the case of major changes, allow changes to take effect prior to the end of such thirty-day period and without publication of notice to the public under such conditions as it may prescribe. For the purpose of this subdivision, "major changes" shall mean an increase in the rates and charges which would increase the aggregate revenues of the applicant more than the greater of one hundred thousand dollars or two and one-half percent, but shall not include changes in rates, charges or rentals allowed to go into effect by the commission or made by the utility pursuant to an order of the commission after hearings held upon notice to the public. No utility shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges specified in its schedule filed and in effect; nor shall any utility refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any

privilege or facility, except such as are regularly and uniformly extended to all persons under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time. Nothing in this chapter shall be taken to prohibit a utility from establishing sliding scale upward rates, beginning at a fixed price per unit for a small consumption and then increasing the price per unit as the consumption is increased. Whenever there shall be filed with the commission by any utility any schedule stating a new rate or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission may, at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative, and, if it so orders, without answer or other formal pleading by the utility, but upon reasonable notice, hold a hearing concerning the propriety of such change, provided that if such change is a major change, the commission shall hold such a hearing; and pending such hearing and decision thereon, the commission, upon filing with such schedule and delivering to the utility, a statement in writing of its reasons therefor, may suspend the operation of such schedule, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after it goes into effect, the commission may make such order in reference thereto as would be proper in a proceeding begun after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility had become effective. Provided that, if any such hearing cannot be concluded within the period of suspension as above stated, the commission may extend the suspension for a further period, not exceeding six months. The commission shall review all filings to determine if they are in compliance

with section seventy-two-a of this chapter. The commission shall have the power to hold public hearings concerning the propriety of any increased rate of charge for fuel costs, at any hearing involving such an increase, the burden of proof as to the correctness and reasonableness of the charge shall be upon the utility. The commission may, as authorized by section seventy-two establish temporary rates or charges for any period of suspension under this section. At any hearing involving a rate, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it. The schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the new schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force during the period of the suspension unless the commission shall establish a temporary rate or charge as authorized by section seventy-two.

The Order of the Commission on rehearing is found at 18 NY PSC 222 (1978), and is set forth in Appendix G hereto; the portion thereof which is relevant to this appeal is at pages 35a-37a.

The Order of the Commission determining revenue requirement is found at 17 NY PSC 820 (1977), and is set forth in Appendix H hereto; the portion thereof which is relevant to this appeal is at pages 61a-63a.

STATEMENT OF THE CASE

Rochester filed proposed changes in its electric and gas rates with the commission on December 3, 1976. Accompanying that filing was Rochester's direct evidence in support of its proposed rate increases consisting of the prepared testimony and exhibits of its witnesses, as required by the regulations of the commission. Included in the expenses claimed by Rochester for rate setting were its actual 1976 informational advertising expenses

of approximately $780,000. None of the expenditures involved either promotional or political advertising. By orders dated December 21, 1976 and April 26, 1977 the commission suspended the effectiveness of the proposed rates to November 2, 1977 and embarked upon public hearings before an administrative law judge, as provided for in section 66(12) of the New York Public Service Law.

In March of 1977 public hearings were held for cross-examination of Rochester's witnesses. Thereafter prepared testimony and exhibits of commission staff and intervenors were filed and were subsequently cross-examined by Rochester and other parties during public hearing in April of 1977. On the issue involved in this appeal, only three witnesses purported to present evidence. A commission staff witness proposed to reduce Rochester's communication expenses for rate setting purposes solely on the basis of the *Statement of Policy on Advertising and Promotional Practices of Public Utilities* which the commission had issued on February 25, 1977.[1] (Appendix N-1, pp. 204a-210a.) Two witnesses for an intervenor group protested provision for any communication expenses, but one of them advocated a small allowance for specified types of communication without explaining the derivation of the amount advocated. (Appendices N-2 and N-3, pp. 211a-216a.) Subsequently, Rochester filed rebuttal evidence which was subjected to cross-examination at public hearings during May. Included therein was the testimony of a vice president regarding its communication expenses, which no party chose to cross-examine. (Appendix N-4, pp. 217a-233a.)

Thereafter, in briefs submitted to the administrative law judge, Rochester argued that disallowance of its communication expenses would be in violation of its right of free speech and without evidentiary support. In his recommended decision,

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[1]Two other aspects of this Statement of Policy have been before this Court. *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n.*, ____ U.S. ____, 65 L.Ed.2d 319 (1980); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, ____ U.S. ____, 65 L.Ed.2d 341 (1980). The Statement of Policy is appended hereto as Appendix L; the portion which pertains to the type of communications here at issue is at pages 184a-187a.

dated August 5, 1977, the administrative law judge rejected Rochester's arguments and allowed only $598,876 for communication expenses, relying solely upon the commission's Statement of Policy as a basis for the portion disallowed. (Appendix I, p. 109a.)

In its brief on exceptions to the commission Rochester again argued that disallowance of its actual test period communication expenses was without record evidentiary support and was contrary to its right of free speech. On November 1, 1977 the commission issued its Opinion and Order Determining Revenue Requirement wherein it rejected Rochester's arguments, denied that the First Amendment right of free speech was implicated, and, relying solely upon its own Statement of Policy, disallowed $460,881 (or approximately 60 percent) of Rochester's communication expenses, asserting that Rochester had failed to meet its burden of proof to overcome the Statement of Policy. (Appendix H, pp. 61a.-63a.)

By application for rehearing dated November 30, 1977 Rochester sought rehearing on the disallowance of its communication expenses, again arguing that it was contrary to its right of free speech, was without evidentiary support and in violation of the Fourteenth Amendment. By its January 20, 1978 Order Granting in Part and Denying in Part Petition for Rehearing, the commission rejected Rochester's arguments, relying primarily upon its Statement of Policy but alluding to the testimony of the staff witness and that of the two intervenor witnesses for additional support. (Appendix G, pp. 35a.-37a.)

Rochester commenced judicial review of the commission's determination in New York Supreme Court, Albany County, pursuant to Article 78 of the New York Civil Practice Law and Rules, on May 19, 1978. In its petition Rochester asserted that the commission's disallowance of 60 percent of its communication expenses was contrary to its right of free speech and without evidentiary support. By Order entered June 1, 1978 the matter was transferred to the Appellate Division of the New York Supreme Court, Third Department. (Appendix F.)

In its briefs to the Appellate Division Rochester argued that the disallowance of its communication expenses in setting rates constituted a limitation upon its right of free speech and that the commission had failed to apply the standards required to sustain such a limitation. Rochester also argued that the commission's determination had no evidentiary support in the record. On November 9, 1978 the Appellate Division issued its opinion and order wherein it sustained the commission's determination. The Appellate Division, while expressing a lack of conviction that the right of free speech was applicable to Rochester and describing Rochester's informational communications as "propaganda," held that there was no direct limitation on free speech because Rochester could communicate freely by diverting revenues, provided in rates to cover the cost of shareholder capital, to pay for additional communication. The court also held that there was no indirect limitation because utility ratepayers are "not concerned with such niceties as the image of a utility" and are not required to pay for all advertising. The Appellate Division concluded that the commission's determination constituted "no infringement upon the freedom of speech" of Rochester. (Appendix E, p. 25a.) Thus the court did not address the commission's failure to apply the standards for testing an infringement under the First Amendment. On the question of evidentiary support for the commission's determination, the Appellate Division held that it was "not lacking for a reasonable basis," but, in so doing, the court relied upon the undisclosed, non-record evidence claimed by commission to underlie its Statement of Policy. (Appendix E, p. 27a.)

Following resolution of a separate issue which the Appellate Division had remitted to the commission (Appendix E, p. 29a, and Appendices B-D), Rochester appealed the issue of the disallowance of its communication expenses to the New York Court of Appeals. In its briefs to that court Rochester argued again that the disallowance of its communication expenses in setting rates is a limitation of free speech, and that the standards required by the First Amendment for determining whether or not a limitation is permissible were not applied by

the commission. Rochester also argued that there is no probative evidence in the record to support the commission's determination; and Rochester asserted that it is a denial of due process of law for a regulatory agency to make a determination in a rate proceeding without evidentiary support in the record of that proceeding or to sustain that determination on the basis of claimed but undisclosed evidence in the record of some other proceeding. On October 14, 1980 the Court of Appeals issued its judgment, affirming the order of the Appellate Division. In its brief memorandum decision the court below held that the commission's action "imposed no restraint, direct or indirect," upon Rochester's communications, and asserted that the Constitution imposes no duty upon government to ensure a person the resources with which to exercise constitutional rights. Finding no restraint, the court below did not address the standards by which such a restraint must be tested. (Appendix A, pp. 1a-2a.) On the question of evidentiary support, the court below held merely that "[i]t cannot be said that this ruling is . . . unsupported by substantial evidence," but gave no indication as to where or what such evidentiary support is. (Appendix A, p. 2a.)

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal invokes critical constitutional provisions: the right of free speech guaranteed by the First Amendment and the right to due process of law guaranteed by the Fourteenth Amendment. Both of these rights have been seriously violated below. If the decision of the New York Court of Appeals stands, neither free speech nor due process will offer protection to the thousands of regulated public utilities in New York State and elsewhere.

In a proceeding for setting its rates, the commission disallowed 60 percent of Rochester's actual, historic level of communication expenses. In so doing, the commission has denied that the right of free speech is involved and has denied the need

for record evidence to support its disallowance; and the courts below have sustained the commission on both issues.

Rochester contends that to affirmatively deny the means essential to exercise the right of free speech necessarily limits the right itself and invokes the standards of the First Amendment. Rochester also contends that due process requires that the rate determinations of the governmental agencies charged with regulating public utilities must have a basis in record evidence. These two issues are crucial for the regulated public utilities in this nation.

The judicially sanctioned discretion allowed the regulatory agency is awesome. The regulatory agency has been conferred with "vast power." *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n*, 47 N.Y.2d, 94, 102, *rev'd on other grounds*, ____U.S.____, 65 L.Ed.2d 319 (1980). Great deference is given to the judgment of the regulatory body. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304 (1937). And, as stated in *New York State Council of Retail Merchants, Inc. v. Public Service Comm'n*, 45 N.Y.2d 661, 672, (1978):

> It is only when it can be shown that the exercise of judgment was without *any* rational basis or without *any* reasonable support in the record that the determination of the commission may be set aside . . . (Emphasis added.)

Faced with this overwhelming deference to the judgment of the governmental agency which regulates it, it is vital to the very existence of the public utility that judicial deference does not become judicial abdication. If the fundamental protection of constitutional rights does not apply then the public utility is at the mercy of administrative whim.

One fundamental right which is called into question by the decisions below, is that of due process. Heretofore the public utility has assumed that the requirements of due process impose upon regulatory bodies the obligation to base rate determinations on substantial evidence in the record. At least to that

degree public utilities have thought themselves to be protected from unfettered regulatory discretion. For, just as the power to tax is the power to destroy, the power to set public utility rates is the power to destroy the public utility. Yet, in the proceeding from which this appeal is taken there is *no* probative evidence in the record to support the commission's disallowance of Rochester's communication expenses. If the decision below stands then due process either is inapplicable to the regulated public utility or no longer requires that regulatory agency rate determinations have any basis in record evidence. In either case the public utility is indeed subject to the whim of the members of the regulatory agency.

The other, and even more fundamental right which is called into question by the decisions below is that of free speech. Given the pervasiveness of the regulation to which it is subject, few persons are more in need of the protection of the First Amendment than the public utility. As this Court has noted, regarding the free flow of information,

> ... if it is indispensible to the proper allocation of resources in a free enterprise system, it is also indispensible to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

This appeal involves neither "promotional" nor "political" communications. As noted by the Appellate Division in its opinion (Appendix E, p. 24 a), the total, test year communication expenditure of $780,000 was spent as follows: 33 percent for promoting conservation (*i.e.*, promoting reduced usage of Rochester's services); 14 percent for promoting safety (*i.e.*, avoidance of injury to customers through Rochester's facilities and safe use of its services); 11 percent for promoting service information (*i.e.*, information on how to obtain and maintain, and how to properly use, service); 1 percent for promoting educational/technical information (*i.e.*, technical appliance and installation data for dealers, repairmen, and do-it-yourselfers); 9

percent for promoting community activities (*i.e.*, civic and charitable activities and fund drives, and area economic development); 8 percent for communicating about energy costs (*i.e.*, the fact of, and reasons for, the rising cost of energy, including that supplied by Rochester); and 23 percent for communicating company information (*i.e.*, information about Rochester — its activities, plans, and problems). (*cf.* Appendix N-4, pp. 217a-226a.) Thus the communication with which the proceeding is concerned is all informational and "non-commercial." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, ____U.S.____, 65 L.Ed.2d 341, 348 n. 5, 361 n. 4 (1980).

These are vital areas for communication between the public utility and its customers.

The benefit of these communications to both the utility *and* its customer would seem self-evident. Many of the enumerated areas of communication provide direct benefits to the customer, through a reduction in his own utility bill or the avoidance of a tragic accident. All of the areas of communication provide indirect benefits to the customer through a lower cost of service for the utility (and, hence, lower rates), fewer appliance service problems, and an improved community.

From the public utility perspective, the ability to communicate with its customers is critical. Given the pervasiveness of regulation and the wide latitude which the regulator possesses, the attitude of the customer is the true court of last resort for the utility. Without the meaningful ability to truthfully communicate with those customers, to explain its concerns and activities to them, the public utility may be condemned to extinction by default.

The court below has sanctioned the economic muzzling of the public utility, holding that to affirmatively deny it the means with which to exercise its right of free speech is "no restraint" upon its right. Thus the questions of whether such a restraint is or is not permissible under the standards of the First Amendment is not dealt with below. If the decision of the court below is

permitted to stand, the protection of the First Amendment for public utilities, so recently confirmed by this Court, will have been rendered largely meaningless.

POINT I

The Right of Free Speech Is Both Involved and Violated in the Proceedings Below.

The essence of the error below has been to treat an issue invoking the right of free speech as if it is no different from, and is subject to the same standards applicable to, the routine process of regulatory ratemaking, i.e., property rights due process. Thus the burden of proof has been imposed on Rochester, and it is presumed that the commission's determination is correct, regardless of what support in the record, if any, that determination may have.

This Court has recently confirmed that a regulated public utility and its communications are entitled to the full protection of the right of free speech. *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n,* ____U.S.____, 65 L.Ed.2d 319 (1980); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra.* The question which this case presents, however, is whether those cases are illusory in their confirmation of that right. The courts below, while purporting to acknowledge Rochester's First Amendment right, simply render that right meaningless by asserting the power of the commission to deny Rochester the means with which to exercise it. What the Supreme Court has clarified, the commission and the courts of New York destroy.

Rochester has not suggested that it is entitled to have provision made in its rates for whatever amount it wishes to expend upon communicating with its customers. On the contrary, Rochester believes that the commission may limit its rate allowance for communication expenditures. However, Rochester does assert (a) that such a limitation *is* a limitation upon Rochester's right of free speech and, as such, (b) that to sustain

such a limitation the standards dictated by the First Amendment must be followed. The errors below consist of asserting that *no* limitation of Rochester's right of free speech exists and, hence, of failing to apply the standards by which the permissibility of that limitation is to be judged.

A. *Denying the Regulated Public Utility the Revenues With Which to Pay the Cost of Communicating With Its Customers May or May Not Be Permissible — But It* Is *a Limitation Upon the Utility's Exercise of Free Speech.*

Neither the commission nor the courts below have reached the issue of the proper standards by which a limitation upon free speech is to be judged in the regulatory, ratemaking context. They have avoided that task by asserting that the denial of the revenues with which to pay for the exercise of the right of free speech, in setting Rochester's rates, is not a limitation upon that right. That assertion is contrary to the decisions of this Court and to reason.

This Court has recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). If one is denied the funds with which to pay the cost of communicating, then clearly one is denied the means of exercising the right to communicate.

The strictures of the First Amendment apply not only to direct bans on speech, but equally to actions which indirectly produce the same effect. In *NAACP v. Button*, 371 U.S. 415, 439 (1963), this Court stated that "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose *or in effect* to stifle, penalize, *or curb* the exercise of First Amendment rights." (Emphasis added.) And in *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967), this Court noted:

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its

> guarantees by indirect restraints so long as no law is passed that prohibits free speech . . . as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

Perhaps more precisely, this Court has held that denial of the means with which to exercise a right is the same as a denial of the right itself. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Both reason and the decisions of this Court make it clear that to deny Rochester the means with which to exercise its right of speech is to deny Rochester the right itself. But the courts below and the commission have responded on two bases that such is not the case, and that no limitation has been imposed upon Rochester's exercise of its right of free speech. First the court below asserts that,

> . . . although the Constitution may provide a citizen the right to engage in a certain activity free of governmental restrictions, it places no general corresponding duty upon government to ensure the availability of all resources necessary to realize that freedom . . . .

and cites opinions of this Court to support that assertion. (Appendix A, p. 2a.) True enough, the cited cases appear to hold that government does not infringe upon a constitutionally protected right merely by failing to give over to a person the financial means to exercise that right. But that is not this case. The court below has failed to appreciate the nature of regulation and its impact upon the issue at hand. The court below has failed to distinguish between affirmatively providing the resources, on the one hand, and denying the opportunity to earn the resources, on the other hand. The latter is the situation in this case.

Rochester is not complaining that the commission failed to give it the funds with which to pay the expense of exercising its right of free speech; no governmental subsidy is sought. Rather, the issue here is the commission's refusal to permit Rochester to

charge rates sufficient to pay the cost of communicating with its customers. The regulated utility has no magic source of funds. It obtains the revenues needed to pay expenses only from the rates charged to customers. If the rates set by the regulatory body fail to provide for an expense, the utility is denied the means of paying that expense.[2] Here the regulatory body so set Rochester's rates as to deny it the sole means of earning the revenues needed to bear the expense of most of its communications. Rather than fail to *provide* the means, the commission has *denied* Rochester the means to exercise its right of free speech.

Can it be doubted that, if the New York Legislature passed a statute which levied a tax on corporations, equal to the expenditures of a corporation for communications in excess of 0.1% of its gross revenues, such a statute would be unconstitutional? *Murdock v. Pennsylvania*, 319 U.S. 105, 112-15 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Yet this is, in effect, what the commission has been permitted to do in the rate-setting process. The only difference is that the commission, as the regulatory body in control of the "purse strings," has "levied" a "front-end tax" by denying the revenues in the first instance, in lieu of subsequently taxing them away.

The other basis on which both the courts below and the commission deny the fact of limitation upon Rochester's right of free speech is with the claim that the cost of communication, beyond that provided for in rates, can be borne out of the return on investment provided for shareholders. (Appendix A, p. 1a; Appendix E, p. 25a; Appendix G, p. 37a.) There are at least three reasons why this response is invalid.

First, in setting rates for a utility the commission is required to provide for a fair and reasonable return on invested capital —

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[2]But for regulation, the privately-owned public utility would be able to routinely recover such communication expenses in its charges to customers, just like other private businesses. *See, e.g., Central Hudson, supra*, ____ U.S. ____, 65 L.Ed.2d 352 n.11; *cf. also, First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

i.e., for the *expense* of invested capital. As Justices Brandeis and Holmes stated in their dissenting opinion in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276, 306 (1923):

> In essence there is no difference between the capital charge and operating expenses, depreciation and taxes. Each is a part of the current cost of supplying the service, and each should be met from current income.

The return provided for shareholders is an expense which stands on its own. It does not represent a fund out of which other expenses of the utility are to be met. *Cf. Board of Public Utility Comm'rs. v. New York Telephone Co.*, 271 U.S. 23, 30-32 (1926). It is clearly unlawful for Rochester's rates to be deliberately set in a manner which requires it to meet a portion of its expenses out of revenues provided for an entirely different expense.

Second, in setting rates the commission deliberately provides for only "the *minimum* cost of capital." *Long Island Lighting Company*, 16 NY PSC 497, 506 (1976) (emphasis added). In this proceeding the commission acknowledged: "The return on equity we allowed RG&E in this proceeding is minimal . . ." (Appendix G, p. 39a.) If the cost of communicating with customers must be deducted from an already minimum allowance to shareholders, then necessarily shareholders must receive less than a minimum fair return. Such a designed result is patently unconstitutional. *Board of Public Utility Comm'rs. v. New York Telephone Co., supra*, 271 U.S. 31. As phrased by another court, in *Mississippi River Fuel Corp. v. Federal Power Comm'n*, 163 F.2d 433, 437 (D.C.Cir. 1947):

> Expenses . . . are facts . . . . If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce.

The commission and courts below would defend one constitutional violation (limiting Rochester's right of free speech) by resort to another constitutional violation (an unfair and inadequate return on investment).

Third, there can be no rational doubt that forcing a utility to deduct the cost of communicating with its customers from an already minimal shareholder return will, at the very least, cause the utility to communicate less than it otherwise would. This Court has made it clear that governmental action which will produce self-imposed limitations upon the exercise of the right of free speech is as offensive to the First Amendment as a direct restraint.[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964).

It is clear that the *fact* of limitation present here may not lawfully be avoided by resort to the suggestion that communication can continue unrestrained merely by diversion of funds provided for the cost of shareholder capital. The commission has imposed a ceiling upon the revenues which Rochester may obtain for the purpose of communicating with its customers. Clearly this is a limitation upon Rochester's exercise of its right of free speech.[4] *The only issue which properly might have been in dispute in this proceeding is whether or not the commission's limitation is permissible under the standards laid down by this Court.* But, erroneously finding no limitation, the courts below failed to address or apply those standards.

Thus it is left to this Court to confirm that in *Consolidated Edison* and *Central Hudson* it was making more than the empty gesture imputed by the court below.

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[3]Indeed, at an earlier date the commission itself seemed to recognize this point:

> If we were to preclude recovery of such expenditures in rates we would, in effect, be telling the companies that if they do any such advertising it will come out of their return, which we try in any event to set at the minimum cost of capital. We are unwilling in that indirect way even to appear to stifle the wide public discussion of these issues that we think desireable.

Long Island Lighting Co., 16 NY PSC 497, 506 (1976).

[4]As this Court has phrased the point in *Buckley v. Valeo*, *supra*, 424 U.S. 19 n. 18:

> Being free to engage in unlimited . . . expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

B. *The Standards Imposed by the First Amendment, Requiring That the Governmental Body Which Seeks to Impose a Limitation Upon the Exercise of Free Speech Bear the Burden of Proof With a Clear and Compelling Showing That Such Limitation Is Necessary and No More Than Necessary, Are Applicable in the Regulation of the Public Utility.*

Rochester does not claim that the First Amendment bestows upon it the right to spend, and recover from its ratepayers, unlimited amounts for communicating with those ratepayers. Such a result would render largely meaningless the whole concept of regulated public utility rates.

This case presents to this Court an issue not heretofore determined insofar as we are aware: how are the constitutional standards required by the First Amendment to be accommodated within the structure of public utility rate regulation? The courts below have not reached this issue simply by denying that the First Amendment is involved.

The commission and the courts below have purported to judge the disallowance of Rochester's communication expenses solely in the context of property rights due process. They have purported to apply the same standards to the allowability of communication expenses as would be applicable to any other issue in a ratemaking proceeding. However, this Court has repeatedly held that very different standards are applicable when the First Amendment is properly invoked. This Court has made clear beyond dispute that the First Amendment has a priority and sanctity which places it above other rights. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945). And this Court has made it equally clear that the higher sanctity of the right of free speech requires much higher standards of due process. In a very relevant passage in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), this Court stated:

> Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. *The right of a State to regulate, for example, a public utility may well include, so far as the due process*

> *test is concerned,* power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech* and of press . . . *may not be infringed on such slender grounds.* (Emphasis added.)

Yet, unless this Court reverses the judgment of the court below, for the public utility there will be no difference in the standards by which its property rights and its right of free speech are to be regulated. Free speech will be just another right, rather than a right of the highest sanctity.

Although steadfastly ignored by the commission and the courts below, the applicable standards by which the commission's limitation upon Rochester's right of free speech is to be judged have been set forth previously by this Court.

1. *Burden of Proof*

In general, New York law places the burden of proof upon the regulated utility to show that its proposed rates are just and reasonable. N.Y. Public Service Law §66(12). While, unlike the *Consolidated Edison* and *Central Hudson* cases, the court below has given us a very small "target" by writing only a brief memorandum opinion, the record makes it indisputable that the commission and the courts below imposed the burden of proof on Rochester on this issue throughout the proceeding. (Appendix E, p. 28a; Appendix G, p. 37a; Appendix H, p. 62a.)

However, where the First Amendment is involved this Court has repeatedly held that the burden of proof is upon the governmental body which seeks to impose the limitation, not upon the person whose right of speech is being limited. *First National Bank of Boston v. Bellotti, supra,* 435 U.S. 786; *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 560 (1975); *Freedman v. Maryland,* 380 U.S. 51, 58 (1965); *Speiser v. Randall,* 357 U.S. 513, 528 (1958).

There is no reason why this standard imposed by the First Amendment should be inapplicable to the regulatory ratemaking process. If the public utility can cope with the burden on virtually all of the other issues, there is no reason that

the regulatory agency should be deemed unable to cope with bearing the burden of proof on the single issue of speech limitations. While property rights due process may permit imposition of the burden of proof upon the public utility on other issues, to do so as to communication expenses is to write second-class status for public utilities into the First Amendment.

2. *Quality of Showing*

The normal standard of judicial review of a commission determination is whether or not that determination has a rational basis and is supported by substantial evidence. *Cf. New York State Council of Retail Merchants, Inc. v. Public Service Comm'n, supra;* N.Y. Civil Practice Law and Rules §7803. The opinions below leave no question but that this was the standard by which the commission's determination here at issue was judged. (Appendix A, p. 2a; Appendix E, pp. 25a, 27a.)

Where the First Amendment is involved this Court has held that a rational basis or mere substantial evidence will not suffice. The First Amendment requires that the showing required of the governmental body, to sustain its limitation of free speech, must be "clear" and "compelling." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. 786; *Thomas v. Collins, supra,* 323 U.S. 530; *West Virginia State Board of Education v. Barnette, supra,* 319 U.S. 639. As noted in the concurring opinion in *McKinney v. Alabama,* 424 U.S. 669, 683-85 (1976), this is the equivalent of requiring, in a civil case, proof "beyond a reasonable doubt."

There is no reason why this standard imposed by the First Amendment should be inapplicable to the regulatory ratemaking process. On virtually every other issue which a public utility may wish to challenge it must meet a burden of showing that there is, in the record, *no* proof of such quality and quantity as could persuade a detached fact-finder to reach the same conclusion as did the regulatory agency. *Cf. 300 Gramatan Avenue Assocs. v. State Division of Human Rights,* 45 N.Y.2d 176, 181 (1978). If the public utility is expected to meet such a

burden on virtually any other issue there is no reason why the regulatory agency should not be held to a similarly stringent standard to sustain its limitation upon the utility's exercise of free speech. To single out the public utility for limitations upon its right of free speech on the basis of merely substantial evidence or a "rational basis" is to impute an exception to the First Amendment where none is written.

3. *Expenditure Level*

While it is clear that, to sustain a limitation upon the right of free speech, the governmental agency which seeks to impose the limitation bears the burden of proof and must make a showing which is clear and compelling — beyond a reasonable doubt, we have found no cases dealing with the First Amendment wherein this Court has indicated just what, in the present circumstances, the regulatory agency must clearly and compellingly show. We believe, however, that a prior decision of this Court, not involving the First Amendment, provides an answer on the latter point.

In most situations it would be unnecessary to seek any further standard. This Court has held that "[t]he First Amendment denies government the power to determine that spending to promote one's . . . views is wasteful, excessive, or unwise." *Buckley v. Valeo, supra,* 424 U.S. 57. However, the very nature of rate regulation with which regulatory bodies are charged precludes an open-ended, infinite allowance for public utility communication expenses. If the standards required by the First Amendment are to be applied in a manner consistent with public utility rate regulation, a further standard, unique to the regulatory forum, is required. But, to be consistent with the First Amendment, the accommodation must be the narrowest possible (*Thomas v. Collins, supra,* 323 U.S. 530) and no greater than necessary (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. 786). Such a standard already exists.

In *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1),* 294 U.S. 63, 72 (1935), this Court held that "[w]ithin the limits of

reason" a public utility must be allowed its promotional advertising expenses in the setting of its rates. Although in *Central Hudson* this Court noted this point with apparent approval (____U.S.____, 65 L.Ed.2d 352 n. 11), *West Ohio* was decided in the context of property rights due process, not in the context of the First Amendment. Given the far greater sanctity of the First Amendment, can a lesser standard be applicable to free speech than that applicable to property rights?

While "the limits of reason" is not a wholly objective standard, it is one with which both courts and administrative bodies are familiar. Being a frequent standard in other areas of rate regulation, it must necessarily satisfy the regulatory mandate. And, when coupled with placement of the burden of proof upon the regulatory agency, to make a clear and compelling showing, such a standard appears to meet the minimum requirements of the First Amendment.

Accordingly, it has been Rochester's position throughout this litigation that: A regulatory agency *may* limit the amount allowed a public utility in rates for the expense of communicating with its customers. But, to do so, the regulatory agency has the burden of showing, clearly and compellingly — beyond a reasonable doubt, that the expenditure level sought by the public utility exceeds the limits of reason and that the level to which the agency has reduced the expense allowance is no lower than is necessary to bring it within the limits of reason.

With the extreme deference given to the determinations of regulatory agencies by the courts, any lesser requirement will render the guarantee of the First Amendment meaningless for public utilities, as this case so vividly demonstrates.

C. *The Showing Required of a Regulatory Agency, In Limiting the Right of Free Speech of a Public Utility, Is Wholly Absent in This Record.*

The potential for First Amendment mischief in the rate-regulation process is fully realized in this case. For, as we discuss in Point II, *infra*, the record in this proceeding shows that there

is *no* probative evidence — much less substantial, and even less clear and compelling, evidence — to support the commission's disallowance of the major portion of Rochester's communication expenses. What the commission has done is to set in advance an arbitrary percentage level, and to then disallow all expenditures above that level.

The court below, in citing *New York State Council of Retail Merchants, Inc. v. Public Service Comm'n, supra,* 45 N.Y.2d 671-72, has made clear its reliance upon a presumption of commission judgment and expertise. (Appendix A, p. 2a.) However, as this Court noted long ago, "[t]he power to create presumptions is not a means of escape from constitutional restrictions." *Bailey v. Alabama,* 219 U.S. 219, 239 (1911).

Thus, while this Court has so recently confirmed the applicability of the right of free speech to the regulated public utility, the commission, with the blessing of the courts below, would make an empty promise of that right. For the courts below would permit the regulatory agency to deny the public utility the essential means with which to exercise its right, and to do so without assuming any burden of proof and without any record basis.

What this Court confirms, the commission and the courts below circumvent. Absent reversal of the decision below the public utility has only that right of free speech that the regulatory agency chooses, in its sole discretion, to allow.

POINT II

Basic Due Process of Law Has Been Denied in the Proceedings Below.

Public utilities have long assumed that, although the regulatory bodies which determine their rates have broad powers, and although the informed judgment of such bodies is given great deference by the courts, the utility at least is protected by the requirements of due process. This case, if the judgment below is not reversed, destroys that assumption and

removes the protection of due process from the public utility in the State of New York.

By statute, the rate determinations of the commission must be supported by substantial evidence. Article 78 of the New York Civil Practice Law and Rules provides, as a basis for judicial review, the question of whether the "determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." *Id.* at §7803(4). Public hearings were held in this case, at which evidence was taken. (*E.g.*, *see* Appendices N-1 - N-4.) Such hearings were "pursuant to direction by law." N.Y. Pub. Serv. Law §66(12).

However, regardless of New York law, the requirements of due process imposed upon the States by the Fourteenth Amendment require that the regulatory body setting the rates of a public utility base its determination upon evidence duly included in the record at a fair and open hearing. *Ohio Bell Telephone Co. v. Public Utilities Comm'n, supra,* 301 U.S. 300-05.

This requirement has been wholly ignored in this proceeding. There is *no* probative evidence in the record to support the commission's disallowance of Rochester's communication expenses. Surely we have not reached such a state of regulation that an agency determination can be based upon a claim of evidence which is offered for review neither to the regulated utility nor to the courts.

We do not know to what "evidence" the court below had reference when it asserted that "[i]t cannot be said that . . . [the commission's determination] is . . . unsupported by substantial evidence" (Appendix A, p. 2a), since its memorandum decision denies us that information. But we *do* know that, with all due respect to the court below, it can indeed be said that the commission determination is unsupported by substantial evidence. For we do know what "evidence" was claimed by the commission to underlie its determination as well as what "evidence" was relied upon by the Appellate Division in sustaining that determination, and we know of no other "evidence" which does,

or is claimed to, support the commission's determination on this issue.

In its original decision the commission based its determination *solely* on its *Statement of Policy on Advertising and Promotional Practices of Public Utilities* (Appendix L), which had been issued after Rochester had filed its direct evidence in the proceeding. (Appendix H, pp. 61a-63a). In its *Order Granting in Part and Denying in Part Petition for Rehearing* ("order on rehearing"), responding to Rochester's point that there was no evidence in the record to sustain its determination, the commission belatedly claimed to have relied also upon testimony of two intervenor witnesses and of one of its staff. (Appendix G, p. 36a.) However, in its briefs to the courts below, the commission did not argue record support, but instead pointed to the "thorough analysis" which, *it claimed*, underlay its Statement of Policy, as the evidentiary basis for its determination — a position which the Appellate Division adopted in sustaining the commission determination. (Appendix E, pp. 25a-27a.) None of the only three bases claimed to provide evidentiary support for the commission's determination constitute the probative, record evidence required by due process.

A. *A Utility's Expenses Are Presumed Reasonable and Proper Absent a Showing to the Contrary.*

A proceeding for setting the rates of a public utility necessarily involves the validity of literally hundreds — even thousands — of items of expense. While the utility normally bears the burden of proof on issues which arise during the course of the proceeding, the utility is not called upon to prove the reasonableness and propriety of each and every item of expense. A rate setting proceeding would become wholly unmanageable if the law were otherwise.

Instead, as a matter of due process, the expenditures of the utility are presumed to be reasonable and proper — and hence must be included in the setting of its rates — unless and until an evidentiary showing is made to the contrary. *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), supra*, 294 U.S. 72; *Missouri*

ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n, supra, 262 U.S. 289. This due process requirement recognizes both the fact that the regulated public utility remains private property and the constitutional right of the owners of property to protect that property.

Thus, absent an evidentiary showing to the contrary, the presumption that a utility's expenditures are reasonable and proper is sufficient and requires that such expenditures be included in the computation of its rates. No contrary showing exists in this proceeding regarding Rochester's communication expenditures.

B. *A Statement of Policy Is Neither Evidence Nor a Substitute for Evidence.*

Originally the commission, in disallowing most of Rochester's communication expenses, relied solely upon its own Statement of Policy. (Appendix H, pp. 61a-63a.) Thus, by fiat, expressed in a statement of policy, the commission has set an arbitrary level of from .0004 to .001 of gross revenues above which it will not allow communication expenses in setting rates. (Appendix H, p. 62a and Appendix G, p. 37a.) Such arbitrary percentage regulation has long-since been held unlawful. *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), supra,* 294 U.S. 68. As was noted in *Mississippi River Fuel Corp. v. Federal Power Comm'n, supra,* 163 F.2d 437: "Expenses . . . are facts. They are to be ascertained, not created, by the regulatory authorities."

Most directly on point, in *Pacific Gas & Electric Co. v. Federal Power Comm'n,* 506 F.2d 33, 38-39 (D.C.Cir. 1974), the court held:

> The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy .... When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its sub-

stantive rules by announcing binding precedent in the form of a general statement of policy.

Not only is the Statement of Policy not evidence or a substitute therefor, but the Statement of Policy itself specifically stated that its guideline range of .0004 to .001 was only a "probability," and that the amount to be allowed for each utility "... will be determined individually for each company, in its next or pending rate case, on the basis of various other factors ...." (Appendix L, p. 186a; footnote omitted.)

It is clear that, as a matter of law, the commission's Statement of Policy is neither probative evidence nor a substitute for such evidence.

C. *The Record in This Proceeding Contains No Probative Evidence Showing That Rochester's Communication Expenses Were Unreasonable or Improper.*

In its order on rehearing the commission pointed to the testimony of two intervenor witnesses and that of a commission staff witness as providing evidentiary support for its disallowance of Rochester's communication expenses. (Appendix G, p. 36a.) We have included all of that testimony in the appendix to this jurisdictional statement (Appendices N-1 - N-3) because it is relatively short and because it shows on its face that such testimony provides no probative evidence on the issue.

The staff witness acknowledged that his recommendation to disallow a portion of Rochester's communication expenses was *not* based upon an analysis of the "specific characteristics and circumstances" of Rochester (Appendix N-1, p. 205a), but, rather, was based solely on an arbitrary application of the commission's Statement of Policy guideline (Appendix N-1, p. 208a). Being based solely on the Statement of Policy, the testimony of the staff witness is no more probative evidence than is the Statement of Policy itself.

The testimony of the two intervenor witnesses cited by the commission in its order on rehearing did no more than protest Rochester's communication expenditures; neither offered any

analysis of why Rochester's expenditure level should be adjudged unreasonable or improper. (Appendices N-2 and N-3.) The commission itself, in its order on rehearing, noted that the testimony of these two witnesses merely "questions" Rochester's expenditure level. (Appendix G, p. 36a.) As a matter of law, such testimony is insufficient. "A case of this sort does not call for minute paring of items protested but not attacked by proofs." *New York & Richmond Gas Co. v. Prendergast*, 10 F.2d 167, 181 (E.D.N.Y. 1925). A suggestion of what ought to be is not a substitute for an evidentiary showing. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978). Further, the commission candidly acknowledged that the matters raised by these two witnesses "were not evaluated." (Appendix G, p. 36a). Surely unevaluated testimony cannot be the basis for a determination.

None of the record testimony provides probative evidence in support of the commission's determination. That may explain why, in its briefs to both of the courts below, the commission did not argue that the evidence in *this* proceeding provides support for its determination, and why the Appellate Division based its finding of evidentiary support upon the evidence *claimed* to underlie the commission's Statement of Policy (Appendix E, p. 27a) rather than anything in the record in *this* proceeding.

D. *It Is a Denial of Due Process to Base a Determination in This Proceeding Upon Alleged Evidence Which Is Not Included in the Record.*

While the brief opinion of the court below does not disclose the substantial evidence which it apparently found to underlie the commission's determination, as we have noted, in both courts below the commission argued only that evidence *alleged* to underlie its Statement of Policy provides evidentiary support for its determination, and the Appellate Division explicitly relied upon that claimed evidence. There is nothing else upon which the court below could have relied. Whatever "evidence" may be *claimed* to underlie the commission's .0004 to .001 "guideline" range of allowable communication expenses, as promulgated in

its Statement of Policy, such "evidence" is neither disclosed nor contained in the record of *this* proceeding.

It is a denial of due process for a regulatory agency to base its determination of a contested issue in a rate making proceeding upon "evidence" which is not introduced in evidence in the proceeding, or even disclosed. *Ohio Bell Telephone Co. v. Public Utilities Comm'n, supra,* 301 U.S. 300-03; *United States v. Abilene & Southern Ry.*, 265 U.S. 274, 288 (1924).

E. *The Record as a Whole Cannot Support the Commission's Determination.*

As summarized in the foregoing, the record contains *no* probative evidence — much less substantial evidence — to support the determination of the commission or the sustaining of that determination by the courts below. Yet it is the whole record on which a determination of the issue at hand is to be evaluated. Given the lack of showing to the contrary, the presumption that Rochester's expenditure level is reasonable and proper stands undiminished and sufficient to require the inclusion of the expenses at issue in rates. Further, the record also contains extensive evidence on behalf of Rochester showing the present and prospective reasonableness and propriety of those expenses. (Appendix N-4, pp. 217a-233a.)

If due process remains applicable to the public utility rate-setting process, and if due process continues to require that regulatory determinations be based upon substantial record evidence, then the determination below cannot stand. It is critical to all public utilities that this Court reaffirm the requirements and applicability of due process in regulatory agency activities.

CONCLUSION

This appeal raises fundamental constitutional issues which are of critical importance to every public utility. First, it raises the questions of whether the regulatory agency's affirmative denial to the regulated entity of the means with which to exercise the right of free speech is a limitation upon that right and, if so, of how the standards by which a speech limitation must be judged are to be integrated with the process of rate regulation. The resolution of these issues will determine whether the decisions of this Court in *Central Hudson* and *Consolidated Edison* were more than mere illusion.

Second, this appeal raises the questions of whether due process requires that a regulatory agency determination of a contested issue in a rate setting proceeding be supported by evidence in the record of that proceeding, or whether, instead, such determination can be based upon either a mere statement of policy issued by the regulatory agency or the undisclosed evidence claimed to underlie that policy statement.

Appellant respectfully submits that this appeal raises substantial federal constitutional questions and that probable jurisdiction should be noted.

Respectfully submitted,

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January, 1981

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 1981, three copies of the foregoing Jurisdictional Statement and of the separate Appendix thereto were served upon the Public Service Commission of the State of New York by mail by depositing the same in a United States post office, first class postage prepaid, addressed to Peter H. Schiff, Esq., General Counsel, Public Service Commission of the State of New York, Agency Building No. 3, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12223. I further certify that all parties required to be served have been served.

Dated this 9th day of January, 1981, at Rochester, New York.

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